Office-Supreme Court, U.S.
FILED
AUG 31 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-174

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

FEDERAL ENERGY REGULATORY COMMISSION and JAMES B. EDWARDS, Secretary of Energy,
Appellants,

vs.

THE STATE OF MISSISSIPPI, ET AL.,
Appellees.

On Appeal from the United States District Court for the Southern District of Mississippi

BRIEF OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

JANICE E. KERR
COUNSEL OF RECORD
HECTOR ARREDONDO
RANDOLPH W. DEUTSCH
EDGAR T. GREEN
350 McAllister Street
San Francisco, CA. 94102
(415) 557-0328
Attorneys for the Public Utilities Commission of the State of California

TABLE OF CONTENTS

	Page
Interest of Amicus Curiae	2
Summary of argument	8
Argument	8
I. Authorizing exemptions from Federal Statutes does not exceed the constitutional powers of Congress	8
II. The unquestionably valid portions of Section 210 (e) may be severed from any invalid parts and upheld	9
Conclusion	13

TABLE OF AUTHORITIES CITED

Cases

	Page
Champlin Refinery Co. v. Corporation Commission, 286 U.S. 210 (1932)	10, 11
Lichter v. United States, 334 U.S. 742 (1948)	9
Sloan v. Lemon, 413 U.S. 825 (1973)	11

Constitutions

California Constitution, Article XII	2
United States Constitution:	
Article IV, Section 4	9
Article VI, Section 2 (Supremacy Clause)	9
Tenth Amendment	9

Regulations

18 C.F.R.:	
292.101 et seq.	4
292.201-292.207	2
292.203	2
292.601	7
292.602	7
45 Fed. Reg.:	
12,232 (1980)	7
12,233 (1980)	7

Statutes

California Public Utilities Code:	
Sections 2801-2806	3
Section 2802	3, 6
Section 2805	3
Section 2811	3
Sections 2812.5-2816	3
Section 2821	3

Table of Authorities Cited

Statutes

	Page
Section 2822	3
Section 2823	3
Federal Power Act of 1976 (16 U.S.C., Section 791a et seq.):	6, 7, 8, 13
Public Utilities Regulatory Policies Act of 1978 (Pub. L. No. 95-617, 92 Stat. 3117 et seq.):	
Section 201	2, 11, 12
Section 210	3, 4, 6, 8, 12
Section 210(b)	5
Section 210(e)	2, 9, 10, 12
Section 210(e)(1)	passim
Public Utility Holding Co. Act of 1976 (15 U.S.C., Section 79 et seq.)	6, 7, 8, 13
16 U.S.C.:	
Section 796	2, 11, 12
Section 824a	7
Section 824a-3(b)	5
Section 824a-3(e)(1)	passim
Section 824a-3(e)(2)	3

Miscellaneous

California Public Utilities Commission Decision No. 91109 (December 19, 1979)	4
California Public Utilities Commission Order Instituting Investigation No. 26	4
California Public Utilities Commission Resolution No. E-1872 (March 4, 1980)	5
H.R. Rep. No. 1750, 95th Cong., 2d Sess. 97-98, reprinted in [1978] U.S. Code Cong. & Ad. News 7831	10

No. 80-1749

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

FEDERAL ENERGY REGULATORY COMMISSION and
JAMES B. EDWARDS, Secretary of Energy,
Appellants,

vs.

THE STATE OF MISSISSIPPI, Et Al.,
Appellees.

On Appeal from the United States District Court for the Southern District of Mississippi

BRIEF OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

The California Public Utilities Commission (CPUC) files this brief as *amicus curiae,* pursuant to Rule 36 of the Court's rules. The consent of counsel for all parties in this case to the filing of this brief has been obtained. The CPUC appears in this proceeding for the limited purpose of requesting the Court to reverse the judgment of the United States District Court for the Southern District of Mississippi[1] as to the exemptions from federal statutes authorized in Section 210(e)(1) of the Public Utility Regulatory

[1]Final Judgment, *Mississippi v. FERC,* Civil No. J79-0212(C) (S.D. Miss. Feb. 17, 1981) (hereinafter "Final Judgment").

Policies Act of 1978 (PURPA)[2] (16 U.S.C. Section 824a-3(e)(1) (Supp. III 1979). To this limited extent, the present brief supports appellants, the Federal Energy Regulatory Commission.

INTEREST OF AMICUS CURIAE

The California Public Utilities Commission is an agency of the State of California. Under Article XII of the California Constitution, the CPUC is charged with the regulation of investor-owned public utilities, including electric utilities, operating in California. Numerous acts of the California Legislature, codified as the California Public Utilities Code[3] have amplified the state constitutional provisions and have added to the explicit authority and responsibilities of the CPUC.

As early as 1976 the California Legislature began enacting statutes designed to encourage entities other than electric utilities to develop alternatives to conventional electrical generation, which utilizes nuclear power or fossil fuels. In 1976 the Legislature enacted sections of the Public Utilities Code which established a category labeled "private energy producers"[4] and which encouraged the development

---

[2]Pub. L. No. 95-617, 92 Stat. 3117 *et seq.*

[3]For the reference of the Court, sections of the California Public Utilities Code referred to in this brief are set forth in the Appendix.

[4]"Private energy producers" of electricity under the California law are similar but not identical to "qualifying facilities" (QFs) as defined in Section 201 of PURPA, 16 U.S.C. Section 796 (Supp. III 1979), and as further defined in 18 C.F.R. Sections 292.201-292.207. Qualifying facilities include cogenerators powered by renewable resources of less than eighty megawatts in size. *See* 18 C.F.R. Section 292.203. With minor exceptions, the exemptions provided in Section 210(e) of PURPA apply only to QFs of thirty

of electrical generation from other than conventional sources by nonutility entities. *See* Cal. Pub. Util. Code Sections 2801-2806. It is significant that among the first incentives offered to private energy producers by the Legislature was exemption from regulation as a public utility by the CPUC. Cal. Pub. Util. Code Section 2802.

Subsequent amendments and legislation added cogenerators to the class of private energy producers and granted the CPUC express authority to set the prices paid by utilities for power purchased from private energy producers (Cal. Pub. Util. Code Section 2821), to establish charges for "standby" or "backup" power supplied by utilities to private energy producers (Cal. Pub. Util. Code Section 2822), and to determine prices in certain circumstances for the transmission of power produced by private energy producers (Cal. Pub. Util. Code Section 2823). In addition, the CPUC was authorized to regulate interconnections between private energy producers and electric utilities. Cal. Pub. Util. Code Sections 2811, 2812.5-2816. These enactments of the California Legislature, together with the general powers granted the CPUC in Public Utilities Code Section 701, establish a state statutory scheme paralleling the provisions of Section 210 of PURPA and empower the CPUC to act in substantially the same areas as those addressed by the Federal Energy Regulatory Commission

---

megawatts or less. 16 U.S.C. 824a-3(e)(2) (Supp. III 1979). Private energy producers are cogenerators (with no efficiency requirements), hydroelectric facilities of no more than thirty megawatts, and other generators of any size which are not powered by fossil fuels or nuclear energy. Cal. Pub. Util. Code Sections 2802, 2805. Other differences between private energy producers and qualifying facilities involve restrictions on ownership and sales.

(FERC) in the rules promulgated in response to Congress' command in Section 210. *See* 18 C.F.R. Section 292.101 *et seq.*

The CPUC shared the desire of the California Legislature to encourage the production of electricity from other than conventional sources. On September 6, 1978, prior to the enactment of PURPA, the CPUC issued its Order Instituting Investigation No. 26 (OII 26) to examine the efforts of the largest electric utility in California to develop nonconventional sources of electric generation. In Decision No. 91109 (December 19, 1979), which resulted from the OII 26 proceeding, the CPUC listed the benefits of nonconventional generation:

> Alternative generation sources, including cogeneration, can offer many benefits. First, cogeneration offers fuel efficiencies. The fuels that may be used in electric generation and industrial processes are consumed more efficiently when combined by cogeneration than they are under conventional technologies.
>
> Second, alternative generating sources diversify the utility's resource plan. This necessarily minimizes dependence on any single source of generation; it increases the reliability of the system and minimizes the risk (financial and otherwise) associated with primary reliance on a single technology.
>
> Third, alternative sources utilizing domestic fuels (such as biomass, woodwaste, and refuse) offer independence from foreign fuel sources. The use of domestic fuels is important for reasons of international economics and politics. The development of domestic sources of fuel is consistent with national goals expressed in the National Energy Act.

> Fourth, . . . [t]he development of many small power plants requires smaller reserves, since it reduces the probability of a large outage, e.g., one-1000 MW plant failing versus many small plants failing simultaneously.
>
> Fifth, the leadtime required for cogeneration is estimated to be several years less than that for large central station power plants, e.g., 3 to 5 years as opposed to 10 years. The development of the smaller cogeneration facilities introduces greater flexibility into resource planning, permitting further development of economic alternatives to large baseload facilities. Also, an indirect economic benefit to the ratepayer and a cash flow benefit to the utility of nonutility-owned cogeneration is that the utility does not have to raise the capital for construction of the cogeneration facility.
>
> Finally, since the cogenerator's facility is not included in the utility's rate base and the cogenerator is only reimbursed for actual power and/or energy generated, the ratepayer does not have to bear the costs of any unscheduled outages of that facility.

To stimulate the growth of nonconventional generators, the CPUC in Decision No. 91109 authorized the utility to purchase electricity from nonconventional generators at the utility's "avoided cost," a concept comparable to "the incremental cost to the electric utility of alternative electric energy" referred to in Section 210(b) of PURPA. 16 U.S.C. Section 824a-3(b) (Supp. III 1979). The CPUC's authorization to pay avoided cost to nonconventional sources was extended to other electric utilities under its jurisdiction in Resolution No. E-1872 (March 4, 1980).

The preceding paragraphs demonstrate that the CPUC commenced its encouragement of cogeneration and small

power production independently of the enactment of PURPA. Section 210 of PURPA and the FERC rules promulgated under authority of Section 210 have to a large extent complemented the CPUC's initial efforts. As outlined in the preceding discussion, the CPUC believes that it has sufficient authority under state law to continue to carry out its policy of promoting cogeneration and small power production, even if the Court were to uphold most of the District Court's judgment.

One aspect of the District Court's judgment, however, would thwart the effectiveness of any further efforts by the CPUC to pursue its and the Legislature's policies of encouraging nonconventional power production. It has been the experience of the CPUC that private investors and entrepreneurs will not even consider becoming involved in electrical generation unless the burden of public utility regulation—on both the state and federal level—is removed. As previously mentioned, among the first encouragements offered to private energy producers by the California Legislature was exemption from regulation as a public utility by the CPUC. Cal. Pub. Util. Code Section 2802. Similarly, in Section 210(e)(1) of PURPA, Congress authorized the FERC to exempt qualifying cogeneration and small power production facilities from the Federal Power Act, 16 U.S.C. Section 791a *et seq.* (1976), and the Public Utility Holding Company Act, 15 U.S.C. Section 79 *et seq.* (1976), if the FERC "determines such exemption is necessary to encourage cogeneration and small power production." Significantly, the FERC in promulgating its rules pursuant to Section 210 has determined that exemptions of QFs from significant portions of the Federal Power Act and the

Public Utility Holding Company Act are necessary to encourage power generation by QFs. 45 Fed. Reg. 12,232, 12,233 (1980). *See* 18 C.F.R. Sections 292.601, 292.602. The effect of the FERC's exemptions is to assure QFs that they will not be regulated as public utilities by the FERC, nor as public utility holding companies by the Securities and Exchange Commission.

In the experience of the CPUC, no significant activity in the area of cogeneration and small power production occurred in California until exemptions from both federal and state public utility regulation were provided. Because all electric utilities under the jurisdiction of the CPUC are connected to multi-state electrical grids, a cogenerator or small power producer who sold power to these utilities would, except for the exemptions from the Federal Power Act authorized in Section 210(e)(1), become a public utility subject to regulation by the FERC. 16 U.S.C. Section 824(a) (1976). The fact that potential cogenerators and small power producers did not take even the preliminary steps necessary to develop their resources during the period when exemptions from only state regulation were in place underscores the importance to California's nonconventional energy program of Congress' authorization of exemption from federal statutes in Section 210(e)(1). Under the judgment of the lower court, however, this authorization would be rendered ineffective because it was contained within the provisions of PURPA which the lower court found unconstitutional.

The CPUC believes that the authorization of exemption from federal laws contained in Section 210(e)(1) was an

act clearly within the constitutional power of Congress. Furthermore, California's independent efforts to encourage electrical generation from nonconventional sources, efforts which in recent months have begun to bear fruit in the form of numerous agreements between utilities and cogenerators and small power producers, will be rendered ineffective if the District Court's reimposition of federal regulation is upheld. For these reasons, the CPUC seeks reversal of the District Court's ruling that the exemption from federal statutes authorized in Section 210(e)(1) is an unconstitutional exercise of congressional power.

SUMMARY OF ARGUMENT

The exemptions from the Federal Power Act and the Public Utility Holding Company Act authorized in Section 210(e)(1) of PURPA are clearly within the scope of constitutional congressional powers. The District Court's holding that the enactment of the provision authorizing these exemptions was unconstitutional should be reversed. These exemptions are entirely independent of the other provisions of Section 210 or Titles I and III of PURPA, and should be severed from the Court's consideration of the other aspects of this case.

ARGUMENT

I. Authorizing Exemptions from Federal Statutes Does Not Exceed the Constitutional Powers of Congress

The constitutional objection relied upon by the District Court—that the challenged portions of PURPA "constitute a direct intrusion on integral and traditional functions" of the states (Final Judgment)—does not apply to the removal of existing federal regulation of QFs. By authoriz-

ing exemptions from *federal* public utility regulation, Congress in no way intruded upon the rights of the State of Mississippi or the Mississippi Public Service Commission, appellees herein, to regulate intrastate activities. Thus, the District Court's finding of violations of the Tenth Amendment, the Supremacy Clause (U.S. Const. Art. VI, Section 2) and Article IV, Section 4 (Final Judgment) are inapposite to Congress' authorization of exemption from federal statutes in Section 210(e)(1). If the provision for exemption from federal law had been separately enacted, its constitutionality would have been beyond challenge. The action of Congress in authorizing the exemption of QFs from federal statutes does not raise a due process objection, the only constitutional objection that could be raised against such an action. Furthermore, Congress' delegation to the FERC of the determination of the extent of the authorized exemptions is also within the constitutional powers of Congress. *Lichter v. United States*, 334 U.S. 742, 778-779 (1948).

II. The Unquestionably Valid Portions of Section 210(e) May Be Severed from Any Invalid Parts and Upheld

As previously discussed, Congress acted within its constitutional powers when it authorized the exemption from federal statutes in Section 210(e)(1). Thus, the only portion of Section 210(e)(1) that would be invalid, should the Court accept the reasoning of the District Court's decision, would be the provision that authorizes the FERC to exempt QFs "from State laws and regulations respecting the rates, or respecting the financial or organizational regulation, of electric utilities." In cases in which a legislative

enactment is constitutionally invalid only as to certain provisions, the Court may sever the invalid provisions and uphold the remaining, valid provisions. As the Court has stated:

> The unconstitutionality of a part of an Act does not necessarily defeat or affect the utility of its remaining provisions. Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.

(*Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210, 234 (1932).

The stated intent of Congress in enacting Section 210(e) was "to encourage cogeneration and small power production." To further that intent, Congress authorized the exemption of QFs from significant aspects of state and federal regulation. It is by no means evident that, had Congress been made aware of any limitation of its power to exempt QFs from state regulation, as the lower court has held, it would have declined to authorize the exemptions from federal statutes. To the contrary, Congress' recognition of the obstacle posed to cogenerators and small power producers by regulation as a public utility would strongly indicate that Congress would have authorized the federal exemptions in any event. *See* H.R. Rep. No. 1750, 95th Cong., 2d Sess. 97-98, *reprinted in* [1978] U.S. Code Cong. & Ad. News 7831-7832.

Thus, the exemptions from federal legislation authorized in Section 210(e)(1) promote the congressional intent of encouraging cogeneration and small power production. The

[This Page Intentionally Left Blank]

exemptions further Congress' intent by authorizing the FERC to allow cogenerators and small power producers to develop their energy resources without the disincentive of federal regulation as public utilities. It is clear, then, that by upholding the validity of Congress' actions in providing these exemptions from federal statutes, the Court would not "create a program quite different from the one the legislature actually adopted," *Sloan v. Lemon*, 413 U.S. 825, 834 (1973), even if the balance of the District Court's judgment were to be affirmed.

Furthermore, it is indisputable that the exemptions from federal statutes authorized by Congress, when viewed apart from the references to state laws and regulations, would be "fully operative as a law." Thus, under the language of *Champlin, supra,* the decision of the District Court concerning Section 210(e)(1) presents a case in which the Court should respect the intention of Congress by severing any invalid portions of Section 210(e)(1) while upholding the constitutionally valid authorization of exemption from federal statutes of Section 210(e)(1).

In addition, the federal exemptions stand alone and do not depend on the validity of other portions of PURPA. The only reference to other provisions of PURPA needed to ascertain the meaning of Section 210(e)(1) is to the definitions of Section 201, 16 U.S.C. Section 796 (Supp. III 1979), a section that was not subject to the District Court's ruling of unconstitutionality. The exemptions constitute a complete and coherent legislative enactment and do not depend in any fashion on the existence or validity of the other challenged portions of PURPA.

Thus, in Section 210(e) Congress acted to remove the barriers to the development of cogeneration and small power production raised by state and federal regulation. Even if Congress' authority to provide for exemption from state regulation were to be limited, as the District Court has held, the authorization of exemption from federal regulation in Section 210(e)(1) in itself provides a significant encouragement to the development of cogeneration and small power production. The authorized exemption from federal regulation is legally and logically severable from the other incentives offered to QFs in Section 210 and from PURPA's other provisions, which, except for Section 210 and the definitions of Section 201, do not refer to cogeneration or small power production. The removal of federal regulation also permits states like California to proceed to promote cogeneration and small power production without federal interference. The plain language of Section 210(e) indicates the strength of Congress' desire to exempt QFs from regulation to the extent "necessary to encourage cogeneration and small power production" and to the full extent of its constitutional powers. The CPUC urges the Court to respect the strength of the congressional intent and to uphold the exemptions from federal statutes authorized in Section 210(e)(1).

CONCLUSION

For the foregoing reasons, the CPUC respectfully requests the Court to reverse the District Court's finding of unconstitutionality with respect to the provisions of Section 210(e)(1) of PURPA which authorize the FERC to exempt QFs from the Federal Power Act and the Public Utility Holding Company Act.

Dated: August 27, 1981

Respectfully submitted,

JANICE E. KERR
COUNSEL OF RECORD
HECTOR ANNINOS
RANDOLPH W. DEUTSCH
BRIAN T. CRAGG
Attorneys for the Public Utilities Commission of the State of California

(Appendix follows)

APPENDIX

The following sections of the California Public Utilities Code are referred to in the brief of the California Public Utilities Commission.

701. The commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction.

2801. The Legislature hereby finds and declares that in order to promote the more rapid development of new sources of natural gas and electric energy, to maintain the economic vitality of the state through the continuing production of goods and the employment of its people, and to promote the efficient utilization and distribution of energy, it is desirable and necessary to encourage private energy producers to competitively develop independent sources of natural gas and electric energy not otherwise available to California consumers served by public utilities, to require the transmission by public utilities of such energy for private energy producers under certain conditions, and remove unnecessary barriers to energy transactions involving private energy producers.

2802. "Private energy producer" includes every person, corporation, city, county, district, and public agency of the state generating or producing electricity not generated from conventional sources or natural gas for energy either directly or as a byproduct solely for his or its own use or

the use of his or its tenants; or generating or producing electricity, or owning the means thereof, to or for any electrical corporation, heat corporation, state agency, city, county, district, or an association thereof, but not to or for the public for any other purpose. Notwithstanding any other provision of law, a private energy producer shall not be found to be a public utility subject to the general jurisdiction of the commission solely because of conducting any activity authorized by this chapter.

2803. "Interconnection" means the facilities necessary to physically connect the energy source of and the point of use by a private energy producer with the existing transmission facilities of a public utility, and shall include any necessary transformation, compression or other facilities necessary to make such interconnection effective.

2804. "Transmission service" means the intrastate transfer of electricity or natural gas by a public utility for any private energy producer between the points of interconnection for use within this state in the service area of the utility.

2805. "Conventional power source" means power derived from nuclear energy or the operation of a hydropower facility greater than 30 megawatts or the combustion of fossil fuels, unless cogeneration technology, as defined in Section 25134 of the Public Resources Code is employed in the production of such power.

2806. "Fossil fuel" means a mixture of hydrocarbons including coal, petroleum, or natural gas, occurring in and extracted from underground deposits.

2807. "Standby charge" means a charge by an electrical corporation for providing standby generation, transmission, and distribution facilities to a private energy producer employing other than a conventional power source for the generation of electricity.

2811. In order to promote the more efficient use and distribution of natural gas or electric energy and eliminate the necessity for construction of transmission facilities for gas or electricity produced by a private energy producer separate from those which may already exist to serve the same area and are owned and operated by a public utility subject to the jurisdiction and control of the Public Utilities Commission, the commission shall authorize the construction of an interconnection by a private energy producer upon application of such producer if the commission makes the findings required by Sections 2812 and 2812.5. The commission shall render its decision on any application filed pursuant to this chapter within 180 days of receipt of the application or at such later time as may be mutually agreed upon by the commission, the applicant, and the interconnecting public utility.

2812.5. Upon application of a private energy producer, and after notice to any affected public utility and hearing thereon, the commission shall authorize such producer to construct an interconnection for the purpose of transmitting electricity, if the commission finds:

(1) That no uncompensated burden will be placed upon the utility or utilities furnishing the transmission service.

(2) That furnishing the transmission service will not result in any added costs or any other adverse consequences for the customers of the electrical corporation.

(3) That the facilities proposed in the application will be used to transmit power from other than a conventional power source for generating electrical power.

The commission shall prescribe such reasonable terms, conditions, and requirements as it deems appropriate.

2813. The private energy producer shall be required to provide and to pay the total cost of the interconnection as well as any costs associated with providing a transmission capacity sufficient to handle that portion of the energy generated by the private energy producer that is over and above the capacity otherwise required by the public utility to service its utility customers and meet other authorized commitments. The public utility shall not be required to construct any additional electric or gas facilities on its system or to acquire any real property by eminent domain or otherwise for such facilities, in order to perform the service contemplated by this chapter unless the costs of such additional facilities or acquisitions are to be borne by the private energy producer.

2815. Nothing in this chapter shall require that any private energy producer perform any service or deliver any commodity to the public or any portion thereof, for compensation or otherwise, except as provided in this article.

2821. The commission shall approve and establish equitable charges to be paid by an electrical corporation which purchases electricity from any private energy producer employing other than a conventional power source for the generation of electricity. The commission may act in this regard on its own motion or on application of an electrical corporation or a private energy producer.

2822. The commission shall approve and establish standby charges for electrical corporations. The commission may act in this regard on its own motion or on application of electrical corporation or a private energy producer.

2823. The commission shall approve and establish charges for transmission service. The commission may act in this regard on its own motion or on application of an electrical corporation or a private energy producer.